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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CYRUS ZAL,

Petitioner,

—v.—

CECIL STEPPE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the unborn child is a person with Fifth and Fourteenth Amendment rights to life and to equal protection of the laws?

II. Whether a pretrial order precluding all affirmative defenses and forbidding the mere mention of over 50 specific words and phrases during the entire course of a jury trial in an abortion rescue case violates defense counsel's First Amendment right to freedom of speech?

III. Whether an accused's right to a jury trial under the Sixth Amendment includes the right to directly appeal to the jury to exercise its powers of nullification?

IV. Whether the preclusion *in limine* of the entire defenses of necessity, the defense of others and the defense of the mistake of fact, and prohibiting the mere mention of over 50 specific words and phrases (hereinafter the "*in limine* orders") during the entire course of a jury trial (with the sole exception of the accused being allowed to state one time the reason he or she blocked the doors to the abortion facility) violate the accused's right to a jury trial under the Sixth Amendment?

V. Whether the *in limine* orders violate the accused's rights to due process of law under the Fourteenth Amendment?

VI. Whether the *in limine* orders violate the accused's rights to effective counsel under the Sixth Amendment?

PARTIES

All parties to the proceeding appear in the caption of the case.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Cyrus Zal respectfully prays that a petition for a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (set forth at pages A-1 to A-27 of the Appendix to this Petition) is reported at 968 F.2d 924

(9th Cir. 1992). The district court opinion is unreported and is set forth at pages A-33 to A-38 of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1992 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). The present Petition is timely if filed on or before September 29, 1992.

CONSTITUTIONAL PROVISIONS

The relevant portions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are set forth below.

First Amendment: "Congress shall make no law....abridging the freedom of speech...."

Fifth Amendment: "No person shall....be deprived of life, liberty, or property, without due process of law...."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed....and to have the assistance of Counsel for his defense."

Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Cyrus Zal (hereinafter "Petitioner"), a member of the State Bar of California, is an attorney at law who was sentenced to serve a nine-month and twenty-day sentence for 20 contempt of court citations received while representing seven defendants in the criminal case of People v. Carla Jean Bultsma, et al. (hereinafter the "*Bultsma* case"), Case No. C101464, tried in the Municipal Court of California, County of San Diego, El Cajon Judicial District (hereinafter "trial court"), before the Honorable Larrie R. Brainard. The Order Adjudging Contempt of the trial court, setting out the basis and the circumstances of Petitioner's contempt citations, is set out in the Appendix at pages A-28 to A-32.

Petitioner began serving his nine-month and twenty-day sentence in custody on August 13, 1990, and completed his sentence on June 9, 1991. Petitioner's nine-month and twenty-day sentence thus has been completely served, with Petitioner actually serving seven months and ten days in custody. On October 29, 1990, the State Bar of California instituted disciplinary proceedings against Petitioner as a result of the twenty contempt citations he received in the *Bultsma* case. The disciplinary matters are presently pending against Petitioner, with a trial scheduled in the State Bar Court on January 11, 1993.

The trial court cited Petitioner for 20 contempts of court for violating certain *in limine* orders and restrictions of the trial court in the *Bultsma* case as a result of Petitioner asking various questions of witnesses during the trial. Petitioner's clients were charged with misdemeanor violations of California Penal Code §602(j) (trespass). On October 21, 1989, Petitioner's clients were arrested outside of a medical building that contained a facility that

performs abortions (the "abortion facility") in La Mesa, California. Petitioner's clients blocked an entrance to the medical building containing the abortion facility by peaceably assembling and physically placing their bodies between the pregnant mothers scheduled for abortions that day and the abortionist(s) inside the abortion facility.

Before jury selection began, the prosecutor submitted a written motion *in limine* to preclude the use of the following affirmative defenses by Petitioner's clients and to exclude all evidence pertaining to the following affirmative defenses by Petitioner's clients during any phase of the trial:

1. Necessity;
2. Defense of others per Penal California Code §694; and,
3. Compliance with international law, treaties, or declarations.

The trial court granted the prosecutor's motion to preclude the above-listed defenses and to exclude all evidence pertaining thereto during any phase of the trial. Before the trial began, the prosecutor also requested the trial court to exclude *in limine* over 50 specific words and phrases. As a result, the trial court ordered Petitioner and Petitioner's clients not to use the following words and phrases:

kill	bloodletting
killer	killing
baby killer	killing centers
baby killers	murderer
murder	fetus
deathscort	abortuary
holocaust	rights of the unborn
abortion	rescuer
death mill	Hitler
unborn	slaughter
Nazi	childslaughter
Nazism	manslaughter

destroy	slay
slaying	extermination
destruction	martyrdom
sacrifice	homicide
execution	fratricide
genocide	parricide
sororicide	aborticide
infanticide	butcher
butchery	monstrosity
feticide	carnage
monster	bloodbath
massacre	mass destruction
decimation	assassin
Cain	thug
cutthroat	eradication
gorilla	

The prosecutor requested that there was to be no reference whatsoever or any utterance of any of the words or phrases listed above during the trial. The trial court granted the prosecution's motion to exclude all reference and utterance of the words and phrases listed above during the trial. These words and phrases were forbidden by the trial court to be mentioned or uttered at any time during the trial, with one exception. The trial court did allow each of Petitioner's clients to tell the jury the reason they had blocked the doors of the building containing the abortion facility: that is, to save the lives of the unborn children scheduled for abortion that day within that building. Petitioner's clients were permitted by the trial court to make such a statement one time only while testifying and were not permitted by the trial court to elaborate on the one statement that they made. Petitioner was not permitted any further inquiry into the subject matter once each of his clients had testified one time that they were trying to save the lives of unborn children by their actions. These statements by each of Petitioner's clients were the only exceptions to the trial court's

in limine orders precluding the defense of necessity, the defense of others, the defense of the mistake of fact, and the prohibition of the specific words and phrases.

During pretrial proceedings, Petitioner's clients made an offer of proof with respect to the defense of necessity and the defense of others by offering to provide scientific and medical evidence proving that the unborn child is a human being. Petitioner's clients also made an offer of proof with respect to the defense of necessity, showing how each element of this defense would be met by evidence to be offered by Petitioner's clients.

After the prosecution's case in-chief had commenced, and after the first four prosecution witnesses had testified, the trial court, during a contempt hearing with respect to Petitioner, precluded the use by Petitioner's clients of the defense of the mistake of fact.

During jury selection, the trial court participated in voir dire by asking the potential jurors whether or not their feelings on the subject of abortion would prevent them from being fair and impartial jurors in the trial.

During the course of the trial, Petitioner was cited for contempt by the trial court on 20 occasions as a result of Petitioner asking the following questions of witnesses (the last statement was made to the jury during closing arguments by Petitioner):

> "Is that the place where they empty the contents of a women's uterus?"
>
> "Are you familiar with those facilities where two persons go in and only one person comes out alive?"
>
> "Can't we ask anything about this baby-killing business, Your Honor?"
>
> "What time do the first victims arrive?"
>
> "How do you feel about making a living off the blood of babies?"
>
> "Are your paychecks bloodstained?"
>
> "Is the unborn baby a life you have sworn to protect?"
>
> "Did you feel an obligation to protect the children who would be killed that day?"

"Officer, were you an unborn baby at some time in your life?"
"Wasn't the safety corridor the place where the babies were taken to be killed?"
"How long have you been in the baby killing business?"
"Does the oath you have taken to tell the truth mean anything to someone who is in the baby killing business?"
"What's done with the bodies of the babies killed by your employer?"
"Where do the bodies go?"
"Are you concerned that you may some day be charged with murder for your role in the abortion holocaust?"
"Did you know what babies they were referring to?"
"Do you know the time, date and place where a life was going to be taken?"
"What do you do when your oath to protect life conflicts with your duties?"
"Do you think perhaps the dog knew the duty to protect life better than the police officers?"
"Do you think you will always protect the baby killers?"
"Are those convictions worth the lives of unborn babies?"
"Now, is it from your own personal knowledge that you know two babies were saved from abortions that day?"
"Isn't that a poster of an unborn child sucking its thumb?"
"No one can require you to rubber stamp a system that protects child killing!''

Petitioner was occasionally given one contempt citation for several questions. In its Order Adjudging Contempt, etc., the trial court stated its basis for the contempt adjudications:

"During *in limine* motions the Court ruled that the trial would be restricted to the charge of trespass (Penal Code §602[j] and that abortion, any 'necessity defense' and 'the rights of the unborn' would not be issues presented to the jury. Counsel and the defendants were specifically

> instructed not to attempt to improperly influence or proselytize the jury on the above issues.
> "In spite of the Court's instructions, and in direct contravention of Court orders, Attorney Cyrus Zal acted as outlined herein... " (A-28 to A-29)

Thus, Petitioner was cited for contempt by the trial court on 20 occasions for violating the trial court's *in limine* orders precluding the defenses of necessity, of others and of the mistake of fact and prohibiting the use of certain words and phrases.

After exhausting his remedies available in the State courts, Petitioner filed a petition for writ of habeas corpus challenging the contempt convictions on April 4, 1991, in the United States District Court for the Southern District Court of California. The statutory basis of subject matter jurisdiction of the District Court was conferred by 28 U.S.C. 2254(a). The District Court denied the petition for a writ of habeas corpus in an Order entered on May 20, 1991. (A-33 to A-38)

On May 21, 1991, Petitioner filed a Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit, with a partial dissent, and with each of the three judges writing a separate opinion, affirmed the district court's denial of the petition for a writ of habeas corpus on July 1, 1992. In the Ninth Circuit, Petitioner had argued that the *in limine* orders were void because the orders violated: (1) his First Amendment rights to freedom of speech; (2) his clients' Sixth Amendment rights to a trial by jury and to effective assistance of counsel; (3) his clients' Fourteenth Amendment rights to due process of law; and (4) the Fifth and Fourteenth Amendment rights of the unborn child. (A-9, A-12)

In its opinion below, the Ninth Circuit held as follows:

(1) Under California law, Petitioner could disobey the *in limine* orders and collaterally challenge the constitutionality of the *in limine* orders after violating those orders (A-8);

(2) Although Petitioner had served his full sentence in custody and was no longer in state custody since filing his petition, the petition was not moot because Petitioner still risked

being disciplined by the State Bar of California if his contempt citations were allowed to stand (A-7);

(3) Although there is a general prohibition on a litigant raising another person's legal rights, Petitioner was entitled to raise his clients' rights and the rights of the unborn in challenging the *in limine* orders under California law (A-12);

(4) The *in limine* orders did not violate Petitioner's clients' Sixth and Fourteenth Amendment rights in excluding the defense of necessity, the defense of others, compliance with international law, treaties, or declarations, and the defense of the mistake of fact, and prohibiting the specific words and phrases (A-13); and

(5) The Ninth Circuit declined to decide whether the unborn child has Fifth and Fourteenth Amendment rights. (A-12)

REASONS FOR GRANTING THE WRIT

I. IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, THE NINTH CIRCUIT DECLINED TO DECIDE WHETHER THE UNBORN CHILD HAS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO LIFE AND TO EQUAL PROTECTION OF THE LAWS.

Despite this Court's eloquent appeal in Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, 505 U.S. ___, 120 L.Ed.2d 664, 708 (1992), wherein the joint opinion called the "contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution", the abortion controversy still rages unabated because this Court has never given an adequate explanation why an entire class of living human beings are not "persons" within the meaning of the Constitution. The controversy has even affected the Ninth Circuit. Almost twenty years ago, this Court in *Roe v. Wade*, 410 U.S. 113, 156 (1973) rejected the argument "that the fetus is a

'person' within the language and meaning of the Fourteenth Amendment." Clearly, the *Roe* Court held that the unborn do not have any Fourteenth Amendment rights. In the instant case, the Ninth Circuit has refused to follow the *Roe* holding, instead stating: "We address the argument without deciding whether a fetus has Fifth and Fourteenth Amendment rights." (A-12) Almost twenty years after the Court decided the case (*Roe*) which the joint opinion in *Casey* designates as the case that called "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution", a circuit court of appeals has failed to follow this ruling of the Court and has instead declined to decide whether the unborn have Fifth and Fourteenth Amendment rights. Petitioner submits that the Ninth Circuit has decided his case in a way which conflicts with applicable decisions of this Court and hence it is appropriate for the Court to grant this petition for a writ of certiorari.

II. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT PRETRIAL ORDERS PRECLUDING ALL AFFIRMATIVE DEFENSES AND FORBIDDING THE MERE MENTION OF OVER FIFTY SPECIFIC WORDS AND PHRASES DURING THE ENTIRE COURSE OF A JURY TRIAL DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

The courts have uniformly held that attorneys retain their rights of free speech even as participants in the judicial process.

"It is thus indisputable that attorneys and parties retain their First Amendment rights even as participants in the judicial process." *In Re Halkin*, 598 F.2d 176 at 187, (D.C.1979).

"Lawyers have First Amendment rights of free speech. They are not second class citizens." *Hirschkop v. Snead*, 594 F.2d 356 at 366, (4th Cir. 1979).

"We recognize that attorneys and other trial participants do not lose their constitutional rights at the courthouse door." [citing L. Tribe, *American Constitutional Law* Sec. 12-11, at 627 n. 26; Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan.L.Rev. 607, 614-18 (1977).] *Levine v. U.S. District Court for the Central District of California,* 764 F.2d 590 at 595 (9th Cir. 1985).

In the *In Re Halkin* case, *supra*, petitioners applied for a writ of mandamus to vacant a court order prohibiting counsel and parties from publicly disclosing information obtained through discovery. The U.S. Court of Appeals granted the writ, finding the court order an unlawful prior restraint upon the freedom of speech of the attorneys and of the parties. The court in *Halkin* noted that

> ". . . [attorneys] have a legal and ethical responsibility to safeguard the right to a fair trial. But lawyers' responsibility to protect the fairness of the judicial process does not mean that lawyers and litigants surrender their First Amendment rights at the courthouse door. Even public officials who have special responsibilities to the court do not necessarily have a 'more severely curtailed' right to freedom of expression than 'the average citizen.' *Wood v. Georgia*, 370 U.S. 375, 393, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962)." (598 F.2d at 186).

In *Hirschkop v. Snead, supra.*, the Fourth Circuit stated a succinct definition of a "prior restraint": "In the generally accepted sense, a prior restraint is one imposed by judicial decree, a violation of which is summarily punishable as contempt." (594 F.2d at 368)

The above passage quoted from *Hirschkop* is dictum in that the Fourth Circuit in the *Hirschkop* case held that a disciplinary rule of the Virginia State Bar which prohibited attorneys from commenting about pending litigation was not a prior restraint because violation of the disciplinary rule did not result in a contempt

citation but rather in the institution of disciplinary proceedings. Nonetheless, the definition of a prior restraint stated by the court in *Hirschkop* is a valid one.

It is clear from the *Hirschkop* definition of a prior restraint that the trial court's order prohibiting words and phrases was a prior restraint in that it was a restraint imposed by a judicial decree, a violation of which was summarily punishable as a contempt.

The *In Re Halkin* case, *supra,* also discusses prior restraints:

> "The term 'prior restraint,' at common law, referred to a system of unreviewable administrative censorship or licensing. [Citations omitted] But the contempt has not been so confined. In a long line of cases beginning with *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct 625, 75 L.Ed. 1357 (1931), the Supreme Court has extended the meaning of prior restraints to include judicial orders having an impact analogous to administrative censorship." (598 F.2d at 183)

Again, under the *Halkin* definition of a prior restraint, the trial court's order prohibiting the use of certain words and phrases had an impact analogous to administrative censorship. What is more clearly a case of censorship than the prohibiting the use, in all and any circumstances during a trial, of 54 words and phrases under pain of contempt?

Any prior restraint of the freedom of expression, while not necessarily unconstitutional per se, nonetheless carries a "heavy presumption" against its validity. *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 at 558, (1975) . "The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression imposed by criminal penalties." *Id.* at 558-59. Indeed, this Court has indicated that prior restraints "are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart,* 427 U.S. 539, 559 (1976).

The court in *Levine v. U.S. District Court for the Central District of California, supra,* provides the tests to which prior

restraints must be measured by:

> "Prior restraints are subject to strict scrutiny because of the peculiar dangers presented by such restraints. [Citations omitted] Accordingly, the district court's order may be upheld only if the government establishes that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *see Wood v. Georgia*, 370 U.S. 375, 383-85, 82 S.Ct. 1364, 1369-70, 8 L.Ed.2d 569 (1962); (2) the order is narrowly drawn, *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84, 89 S.Ct. 347, 352-53, 21 L.Ed.2d 325 (1968); *Halkin*, 598 F.2d at 193-94; *Sherman*, 581 F.2d at 1361; and (3) less restrictive alternatives are not available, *Nebraska Press Association*, 427 U.S. at 563, 96 S.Ct. at 2804: *CBS*, 729 F.2d at 1182-83." (764 F.2d at 595)

The *Levine* case involved a defendant charged with espionage whose attorneys petitioned for a writ of mandamus compelling the district court to dissolve a restraining order prohibiting attorneys involved in the case from communicating with the media regarding the merits of the case. Despite the court in *Levine* noting that the Supreme Court has suggested that it is appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of non-participants and further noting that the case for restraints on trial participants is especially strong with respect to attorneys, the court nevertheless found that the district court's order violated the attorney's right to free speech and was an unlawful prior restraint on such rights because the order was overbroad. (764 F.2d at 599.) In finding the district court's order overbroad, the *Levine* court held that only speech by attorneys which "poses a serious and imminent threat to the administration of justice" may be prohibited in a prior restraint by the court. (764 F.2d at 599.)

Thus, according to the *Levine* case, the proper test to apply to the issue of what speech of an attorney may be properly enjoined by a judicial prior restraint is limited to that speech which "poses a serious and imminent threat to the administration of justice." (*Id.*)

It is clear that the prohibited words and phrases that were subject to the prior restraint of the trial court did not, in and of themselves, pose a serious and imminent threat to the administration of justice. In fact, one of the prohibited words--"abortion"--was used extensively by the trial court itself during jury selection. The trial court asked each prospective juror if his or her opinion on the subject of abortion was so strong that it would prevent him or her from being a fair and impartial juror in the matter. The trial court's use of a prohibited word is an admission by the trial court itself that its order was overbroad. It is hard to imagine how some of the other words, such as "fetus", "rescuer", "unborn", and "rights of the unborn" could constitute, in and of themselves, a serious and imminent threat to the administration of justice. There are certainly many, many innocent and proper uses of these words during a trial. Even words such as "Hitler", "Nazi" or "Nazism", "murder", and "holocaust" may be used in innocent and proper ways during a trial. Who is to say that some reference to Hitler, a historical figure, would not be proper in closing arguments? The trial court's order in prohibiting certain words and phrases is clearly an unlawful prior restraint of Petitioner's First Amendment rights to free speech in that the order is overbroad. The order prohibited *all* use of the words and phrases, even innocent uses of those words and phrases. (Thus, a hypothetical question such as "Did you think your car having a flat tire *killed* your chances of getting to the *abortion* facility on time?" would have been sanctionable under the trial court's order.) The order cannot meet the heavy presumption against its validity that it carries.

In its opinion below in this case, the Ninth Circuit held that the extent of Petitioner's free speech rights were to respectfully

preserve his point for appeal. (A-10) Thus, the Ninth Circuit cited this court's opinion in *Gentile v. State Bar of Nevada*, --U.S.--, 111 S.Ct. 2720, 2743:

> "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed 717 (1952).... [additional citation omitted]" (A-10)

However, Judge Noonan in his dissent in this case rightly points out that the above passage quoted from *Gentile* was dicta in that *Gentile* concerned out-of-court statements by an attorney, not advocacy in a trial. (A-25 to A-26) Judge Noonan goes on to note in his dissent:

> "The dicta do not address a judicial system where it is perfectly lawful for an attorney to ignore an order of the court if the attorney believes it unconstitutional *and* can successfully show that it is. *Sacher* itself dealt with the appropriate conduct for lawyers in a federal court. In that forum, 'if the ruling is adverse, it is not counsel's right to resist it,' *Sacher*, 343 U.S. at 9, 72 S.Ct. at 455. California has a different judicial system. Under California law, a contempt citation is void *if* it is based on an unconstitutional court order. *In re Berry*, 68 Cal.2d 137, 65 Cal.Rptr. 273, 280, 436 P.2d 273, 280 (1968)(an unconstitutional order 'is issued in excess of jurisdiction and cannot sustain a contempt judgment based upon its violation'); *In re Misener*, 38 Cal.3d 543, 558, 213 Cal.Rptr. 569, 698 P.2d 637 (1985)('an order of contempt cannot stand if the underlying order is invalid.'); *In re Blaze*, 271 Cal.App.2d 210, 76 Cal.Rptr. 551 (1969). Under California procedure, if the attorney is willing to take the risk, he can ignore the void order and be vindi-

> cated. [Citation omitted] In such a system, the dicta of *Gentile* are not a complete guide to the attorney's right to free speech." (Emphasis in original) (A-25 to A-26)

Petitioner agrees that Judge Noonan's analysis of an attorney's free speech rights in a California state courtroom is the correct analysis to be applied in this case.

The Ninth Circuit opinion also argues that a standard less stringent than the "clear and present danger" test applicable to prior restraints should be applied to Petitioner's free speech issue, because in *Gentile*, 111 S.Ct. at 2744, this Court held that "lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed2d 683 (1976)." (A-10 to A-11)

Again, *Gentile* is dicta because it concerned out-of-court statements by an attorney, not advocacy during a trial.

This Court *In re Little*, 404 U.S. 553, 555 (1972) (per curiam) applied a test similar to the clear and present danger test to an attorney's in-court conduct. It is Petitioner's position that the same clear and present danger standard as in *Little* should be applied to Petitioner's conduct here.

Similarly, this Court in *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974) held that with respect to language used in the courtroom, to be punishable the language must constitute an imminent threat to the administration of justice. The Ninth Circuit itself similarly concluded in *Matter of Contempt of Greenberg*, 849 F.2d 1251, 1255 (9th Cir.1988) that "summary criminal contempt procedures should be used only in exceptional circumstances where there is an immediate threat to the judicial process."

In the present case, the Ninth Circuit attempts to distinguish the clear holdings of *Little*, *Eaton*, and *Greenberg* by stating that Petitioner in the present case intentionally violated a specific court order. (A-) This distinction is irrelevant in a judicial system where it is perfectly lawful for an attorney to ignore an order of the court

if the attorney believes it unconstitutional and can successfully show that it is. (*In re Berry, supra*, 436 P.2d at 280) Whether Petitioner intentionally violated the trial court's restrictions on the use of specific words and phrases does not shed any light on the issue of whether the challenged restrictions are constitutional under the First Amendment. The restrictions on the use of over fifty specific words and phrases were clearly a prior restraint in that *any use of the forbidden words, innocent or not, were summarily punishable by contempt.*

III. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT AN ACCUSED'S RIGHT TO A JURY TRIAL DOES NOT INCLUDE THE RIGHT TO DIRECTLY APPEAL TO THE JURY TO EXERCISE ITS POWERS OF NULLIFICATION

In its opinion below, the Ninth Circuit stated:

> "At oral argument, Zal candidly admitted that he violated the orders in service of a 'higher law.' Zal's intent was to reach the jury on the precluded defenses and prompt it to use its powers of nullification." (A-6)

The trial court in its Order Adjudging Contempt stated with respect to contempt citation #20 that Petitioner "During closing argument, strongly argued 'Jury Nullification'." (A-31)

It is Petitioner's position that it is the right of every accused to directly appeal to the jury to exercise its powers of nullification. The leading case on the issue of jury nullification in the state courts is *United States v. Dougherty*, 473 F.2d 1113, (D.C. Cir. 1972). (In 1895, this Court eliminated the jury's role as judge of the law in the federal court system in *Sparf v. United States*, 156 U.S. 51 (1895).) In *Dougherty*, the District of Columbia Circuit Court of Appeals recognized "The existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge...." (473 F.2d at

1132) The *Dougherty* court held, however, that the accused is not entitled to have the jury informed of its powers of nullification. (*Id.* at 1136):

> "The fact that there is widespread existence of the jury's prerogative, and approval of its existence as a 'necessary counter to case-hardened judges and arbitrary prosecutors,' [citation omitted] does not establish as an imperative that the jury must be informed by the judge of that power."

The *Dougherty* court held that to exercise its powers of nullification the jury "must independently initiate and undertake an act in contravention of the established instructions." (*Id.* at 1137)

In a dissenting opinion in *Dougherty*, Judge Bazelon stated:

> "The sticking point, however, is whether or not the jury should be told of its power to nullify the law in a particular case. Here, the trial judge not only denied a requested instruction on nullification, but also barred defense counsel from raising the issue in argument before the jury. The majority affirms that ruling. I see no justification for, and considerable harm in, this deliberate lack of candor." (*Id.* at 1139)

It is undisputed in the present case that Petitioner was attempting to directly appeal to the jury to exercise its legitimate powers of nullification when he violated the trial court's *in limine* orders and ban on forbidden words. It is Petitioner's position that every accused has a right under the guarantee of a jury trial in the Sixth Amendment to directly appeal to the jury to exercise its powers of nullification. Although the *Dougherty* case involved a protest against the war in Southeast Asia in 1972, one can easily substitute the word "abortion" in place of "the war in Southeast Asia" in the following passage of Judge Bazelon's dissent in *Dougherty*:

> "If revulsion against the war in Southeast Asia has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged

here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist." (*Id.* at 1144)

IV. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE TRIAL COURT'S *IN LIMINE* ORDERS PRECLUDING ALL AFFIRMATIVE DEFENSES AND FORBIDDING THE MERE MENTION OF OVER FIFTY SPECIFIC WORDS AND PHRASES DID NOT VIOLATE PETITIONER'S CLIENTS' RIGHTS TO A JURY TRIAL UNDER THE SIXTH AMENDMENT.

When the trial court in the present case granted the prosecution's *in limine* motion to preclude the entire defenses of necessity, the defense of others and the defense of the mistake of fact, and prohibiting the mere mention of over fifty specific words and phrases (hereinafter the "*in limine* orders") during the entire course of the jury trial (with the sole exception of the accused being allowed to state one time the reason why he or she blocked the doors to the abortion facility), the trial court in effect directed a verdict in favor of the prosecution and against Petitioner's clients and invaded the jury's province in violation of the Sixth Amendment. *See* Colbert, "The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial", 39 *Stan.L.Rev.* 1271 at 1318-1323 (1987). As the *in limine* motion has become more popular with prosecutors, courts have found on occasion that exclusion of an entire defense was an invasion of the jury's province, *e.g.*, *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984).

Petitioner's clients in the present instance were involved in a politically sensitive case in that their actions in blocking the doors of the building containing the abortion facility was a direct challenge in opposition to established governmental policy originating in this Court in *Roe* in 1973 of abortion on demand in

America. The trial court's *in limine* orders eliminated all affirmative defenses available to Petitioner's clients and went even further by forbidding the use of over fifty common words and phrases, and thus seriously eroded, if not completely nullified, the crucial role of the jury as judge of fact. These *in limine* orders represent a direct attack on Petitioner's clients' rights to trial by jury and may be characterized as the trial court ordering summary judgment against Petitioner's clients. The trial court's *in limine* orders had the effect of removing the determination of guilt or innocence from the jury's hands and resulted in the trial court coercing the jury into delivering verdicts of guilty against six of the seven clients that Petitioner represented in the trial (the jury was unable to reach a verdict with respect to the seventh defendant in this case represented by Petitioner).

This Court in *Williams v. Florida*, 399 U.S. 78, 100 (1970) stated:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."

In *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) this Court expressed its respect for the jury's historic role in our democracy:

> "A right to a jury trial is granted to criminal defendants in order to prevent oppression by the government. Those who wrote our Constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."

The trial court's *in limine* orders precluding entire affirmative defenses and forbidding the mere mention of over fifty specific words and phrases directly challenges the jury's role, as envisioned by the Framers of the Constitution, as a democratic body. This role is all the more important in politically sensitive cases, where the defendant's only opportunity to be judged fairly depends on a jury gaining sufficient understanding of the circumstances leading to the accused's arrest. Political dissidents are often portrayed as dangerous extremists seeking to overthrow the system, making full knowledge of the truth all the more crucial as the defense attempts to overcome the jury's alarm. Additionally, "the power of the citizenry, exercised directly and meaningfully through juries, is an additional safety check in our multi-branched checks and balances system of democracy. The jury is the branch least susceptible to corruption and the one most likely to be objective, when educated and informed, for it lacks any direct vested interest in political trials of government dissidents." Colbert, "The Motion In Limine and Politically Sensitive Cases," 39 *Stan.L.Rev.* at 1320-21. To prevent juries from serving as a rubber stamp, and to preserve their historic role as a democratic body, this Court must carefully scrutinize the trial court's *in limine* orders to ascertain whether those orders prevented Petitioner's clients from presenting a full defense to the jury members who passed judgment on them. It is firmly Petitioner's position that the *in limine* orders invaded the fact-finding province of the jury in violation of Petitioner's clients' Sixth Amendment rights to a jury trial.

V. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE *IN LIMINE* ORDERS DID NOT VIOLATE PETITIONER'S CLIENTS' RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

The right of a defendant in a criminal case to present his or her own version of the facts and to present witnesses to establish a defense is guaranteed by the due process clause of the Fourteenth Amendment. *Washington v. State of Texas*, 388 U.S. 14, 19 (1967).

It is also a due process requirement that convictions cannot be brought about by methods that offend a sense of justice. *Rochin v. California*, 342 U.S. 165 (1951). The trial court's *in limine* orders employed in the present instance clearly offend a sense of justice. Petitioner's clients were so restricted and confined by the trial court that they could not use the heart of their defense: that they blocked the doors to the abortion facility in order to save the lives of unborn children. Indeed, Petitioner, on behalf of his clients, could not even use the words "abortion" or "rights of the unborn". To deny a defendant the use of any and every available defense and the use of over 50 common words and phrases clearly offends a sense of justice. The necessity defense is a proper defense in abortion facility trespass cases. *See* Senftle, "The Necessity Defense in Abortion Clinic Trespass Cases," 32 *St.Louis Univ.L.J.* 523 (1987).

VI. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE *IN LIMINE* ORDERS DID NOT VIOLATE PETITIONER'S CLIENTS' RIGHTS TO EFFECTIVE COUNSEL UNDER THE SIXTH AMENDMENT

This Court has held that the Sixth Amendment right to assistance of counsel includes the right to *effective* assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932). The trial court's *in limine* orders precluding all affirmative defenses and prohibiting the use of over fifty specific words and phrases were void in that they violated Petitioner's clients' rights to effective counsel under the Sixth Amendment. One aspect of the right to effective assistance of counsel is the right to a defense counsel whose undivided loyalties lie with his accused client. *Glasser v. United*

States, 315 U.S. 60 (1942). This Court has said that the Sixth Amendment guarantee that a criminal defendant have assistance of counsel "contemplates that such assistance be untrammeled and unimpaired." *Id.* at 70. The trial court's *in limine* orders precluding all affirmative defenses and prohibiting the use of over fifty specific words and phrases clearly impaired Petitioner's ability to give effective counsel to his clients and also divided Petitioner's loyalties in that he had to both defend his clients effectively and protect himself against contempt charges.

CONCLUSION

It is respectfully submitted that Petitioner's petition for certiorari should be granted and that the issues raised therein should be addressed by the justices of this Court.

Dated: September 28, 1992
Folsom, California

Respectfully Submitted,

/s/ Cyrus Zal

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CYRUS ZAL,
Petitioner-Appellant,
v.
CECIL STEPPE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

No. 91-55579
D.C. No. CV-91-0473-GT
OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., Chief Judge, Presiding

Argued and Submitted
January 7, 1992—Pasadena, California

Filed July 1, 1992

Before: Jerome Farris, John T. Noonan, Jr., and Stephen S. Trott, Circuit Judges.

Opinion by Judge Farris; Concurrence by Judge Trott; Dissent by Judge Noonan

SUMMARY

Individual Rights/Constitutional Rights

Affirming a district court judgment denying habeas relief, the court of appeals held that an attorney did not have a first amendment right to present any of the state trial court's excluded defenses.

Appellant Cyrus Zal, an attorney representing abortion protestors, challenged a state court contempt citation for violating its evidentiary orders excluding various defenses. It was not disputed that Zal knowingly and intentionally flouted the trial court's orders. Zal's intent was to reach the jury on the precluded defenses and prompt it to use its powers of nullification. Zal argued that the contempt citations were void because the trial court's evidentiary orders violated his first amendment rights. The district court denied Zal's petition for habeas relief.

[1] The court stated that an attorney may not, by speech or other conduct, resist a ruling of a trial court beyond the point necessary to preserve a claim for appeal. Here, the trial court's orders did not infringe Zal's right to preserve his or his clients' right to appeal. Consequently, the orders did not violate the first amendment. [2] Rejecting the argument that the "clear and present danger" standard should guide its analysis because the trial court's evidentiary rulings were prior restraints, the court noted that lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press. [3] Accordingly, zealous counsel cannot flout the authority of a trial court in preserving courtroom decorum behind the shield of the first amendment. [4] Neither did the evidentiary orders violate Zal's clients' sixth and fourteenth amendment rights unless the court erred, as a matter of federal law, in excluding the defenses in question. Zal was not entitled to present those defenses to the jury through a back door by making the actions of his clients understandable as human actions.

Concurring, Judge Trott believed that a lawyer properly functioning as such on behalf of a client has no real first amendment rights in the courtroom beyond those of his clients. Although courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial court and the rule of law.

Dissenting, Judge Noonan disagreed with the majority as to what order Zal was held in contempt for violating and as to the validity of such in the light of California practice and the first amendment.

COUNSEL

Stephen E. Hurst, The Rutherford Institute of California; Cyrus Zal, Encinitas, California, Pro per, for the petitioner-appellant.

David Florance, Deputy County Counsel, San Diego, California, for the respondents-appellees.

OPINION

FARRIS, Circuit Judge:

Cyrus Zal, an attorney, appeals the district court's denial of his habeas corpus petition, which challenged his state court contempt citations for violating the trial court's evidentiary orders. Zal argues that the citations are void because the orders violated his First Amendment rights, his clients' Sixth and Fourteenth Amendment rights, and the Fifth and Fourteenth Amendment rights of the unborn. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 (1988) and 2253 (1988). We affirm.

FACTS

Zal represented seven abortion protestors who were charged with criminal trespass. During *in limine* proceedings, the trial court excluded the defenses of: (1) necessity; (2) defense of others; (3) compliance with international law, treaties, or declarations; and (4) mistake of fact. The judge also

ordered him not to use the following words, which were linked to the excluded defenses:

kill	bloodletting
killer	killing
baby killer(s)	killing centers
murder(er)	fetus
deathscort	abortuary
holocaust	rights of the unborn
abortion	rescuer
death mill	Hitler
unborn	slaughter
Nazi(ism)	childslaughter
manslaughter	destroy
slay(ing)	extermination
destruction	martyrdom
sacrifice	homicide
execution	fratricide
genocide	parricide
sororicide	aborticide
infanticide	butcher(y)
feticide	carnage
monster	bloodbath
massacre	mass destruction
decimation	assassin
Cain	thug
cutthroat	eradication
gorilla	monstrosity

Although the record does not contain the trial court's orders, which apparently were made orally, Zal has provided a list and counsel for California has not disputed any word on the list, either in their brief or at oral argument. We assume that the list is accurate.

Despite the court's evidentiary orders and repeated warnings, Zal asked witnesses the following questions:

Is that the place where they empty the contents of a woman's uterus?

Are you familiar with those facilities where two persons go in and only one person comes out alive?

Can't we ask anything about this baby-killing, Your Honor?

What time do the first victims arrive?

How do you feel about making a living off the blood of babies?

Are your paychecks bloodstained?

Is the unborn baby a life you have sworn to protect?

Did you feel any obligation to protect the children who would be killed that day?

Officer, were you an unborn baby at some time in your life?

Wasn't the safety corridor the place where babies were taken to be killed?

How long have you been in the baby-killing business?

Does the oath you have taken to tell the truth mean anything to someone who is in the baby killing business?

What's done with the bodies of the babies killed by your employer?

Where do the bodies go?

Are you concerned that you may some day be charged with murder for your role in the abortion holocaust?

Did you know what babies they were referring to?

Do you know the time, date and place where a life was going to be taken?

What do you do when your oath to protect life conflicts with your duties?

Do you think perhaps the dog knew the duty to protect life better than the police officers?

Do you think you will always protect the baby-killers?

Are those convictions worth the lives of unborn babies?

Now, is it from your own personal knowledge that you know two babies were saved from abortions that day?

Isn't that a poster of an unborn child sucking its thumb?

Zal occasionally was given one contempt citation for several questions. In sum, Zal was held in contempt twenty times.

It is not disputed that Zal knowingly and intentionally flouted the trial court's orders excluding certain defenses. At oral argument, Zal candidly admitted that he violated the orders in service of a "higher law." Zal's intent was to reach the jury on the precluded defenses and prompt it to use its powers of nullification. The prohibited words were taken

from Zal's attempts to accomplish the same mischief in previous cases.

STANDARD OF REVIEW

We review the district court's denial of Zal's habeas petition *de novo*. *See Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991). "We give deference to the state court's findings of the underlying facts, but reserve the right to give different legal weight to such facts." *Reiger v. Christensen*, 789 F.2d 1425, 1428 (9th Cir. 1986).

DISCUSSION

1. *Jurisdiction*

We recognize two possible jurisdictional questions. First, since filing his petition, Zal has served his full sentence and no longer is in state custody.

> Generally, a petition for habeas corpus becomes moot should a prisoner be released from custody before the court has addressed the merits of the petition. However, the courts recognize an exception in those cases where the prisoner can show that he will suffer some collateral legal consequences if the challenged conviction is allowed to stand.

Robbins v. Christianson, 904 F.2d 492, 494 (9th Cir. 1990) (citations omitted). Zal risks being disciplined by the California State Bar if his contempt citations are allowed to stand. His petition is not moot.

Second, "relief under [28 U.S.C. § 2254(a) (1988)] can be granted only for a violation of the United States Constitution, a federal statute, or a treaty." *Rodriguez v. Rickets*, 777 F.2d 527, 528 (9th Cir. 1985). The California Supreme Court has held:

> In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt .... "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory decision, or rules developed by the courts ... are in excess of jurisdiction."

In re Berry, 436 P.2d 273, 280 (Cal. 1968) (in bank) (quoting *Abelleira v. Dist. Court of Appeal*, 109 P.2d 942, 948 (Cal. 1941)). Zal argues that the contempt citations are void because the trial court's evidentiary orders violated, *inter alia*, his First Amendment rights. We have noted that "attorneys ... do not lose their constitutional rights at the courthouse door." *Levine v. United States Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). Zal's petition presents a federal claim.

Section 2254(a) also requires that Zal be "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In *Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967), the Supreme Court upheld Alabama's procedural rule that a party cannot collaterally challenge the constitutionality of a court order after violating that order. In *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725 (9th Cir. 1989), we noted that "the collateral bar rule permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional." But, although a state *may* adopt the collateral bar rule, it need not do so as a matter of federal law. Since California has explicitly elected not to do so, *see Berry*, 436 P.2d at 281 ("a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished"), we can address the merits of Zal's First Amendment claim.

In so holding, we recognize that this case differs markedly from *Bishop v. Kelso*, 914 F.2d 1468 (11th Cir. 1990), and

similar cases. The *Bishop* court, on habeas review, applied the sufficiency of the evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), rather than the more demanding standard prescribed by state law. *See Bishop*, 914 F.2d at 1472-73. The court held that "[o]nly in a case where the failure to meet a higher state burden of proof raises independent constitutional concerns . . . would a federal court on collateral review examine the evidence to determine whether the state had met its self-imposed burden." *Id.* at 1473. This case does not involve a state substantive standard that is more demanding than the corresponding federal standard. Zal argues that the trial court's evidentiary orders violated the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. There is but one *substantive* standard—that prescribed by federal law. Unlike *Walker*, these claims are not foreclosed by a state "*procedural* requirement." 388 U.S. at 319 (emphasis added).

2. *Zal's First Amendment claims*

[1] Zal argues that the contempt citations are void because the trial court's evidentiary orders violated his First Amendment rights. We reject Zal's argument for the reasons set forth in *Sacher v. United States*, 343 U.S. 1, 8-9 (1952) (emphasis added):

> Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and fre-

> quently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.
>
> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. *But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.* During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.

In *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2743 (1991), the Court similarly noted that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." The trial court's evidentiary orders did not infringe Zal's right to preserve his or his clients' right to appeal. In fact, he could have followed the procedure for an interlocutory appeal following the pretrial ruling. We therefore hold that the orders did not violate the First Amendment.

[2] Zal argues that the "clear and present danger" standard should guide our analysis because the trial court's evidentiary orders are "prior restraints." This argument is contrary to *Gentile*, 111 S. Ct. at 2744, which held that "lawyers repre-

senting clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)." Although *In re Little*, 404 U.S. 553, 555 (1972) (per curiam), applies a test similar to the clear and present danger test to an attorney's in-court conduct, the attorney in *Little* was punished for violating a general contempt statute that proscribed "[d]isorderly, contemptuous, or insolent behavior . . . tending to interrupt [the court's] proceedings, or to impair the respect due to its authority." *Id.* at 555 n.* (quoting N.C. Gen. Stat. § 5-1(1) (1969)). *See also Eaton v. City of Tulsa*, 415 U.S. 697, 697 (1974) ("direct contempt," in violation of Tulsa ordinance). In *Matter of Contempt of Greenberg*, 849 F.2d 1251, 1255 (9th Cir. 1988) (construing Fed. R. Crim. P. 42(a)), we similarly concluded that "summary criminal contempt procedure should be used only in exceptional circumstances where there is an immediate threat to the judicial process." Zal intentionally violated a specific court order; *Little* and *Greenberg* are inapposite.

Judge Noonan similarly misinterprets applicable case law. The Court in *Sacher* did not hold that a party must "make impossible an orderly and speedy discharge of the case," *infra* at ___ (quoting *Sacher*, 343 U.S. at 4), in order to be held in contempt. *Gentile* reaffirms *Sacher*'s holding: "if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal." *Sacher*, 343 U.S. at 9. *See Gentile*, 111 S. Ct. at 2743. Contrary to Judge Noonan's suggestion, *see infra* at ___, this holding is not altered by *Berry* and its progeny; these cases provide *only* that a contempt citation is void if the underlying order is unconstitutional. *See Berry*, 436 P.2d at 280.

[3] Judge Noonan also emphasizes that various questions asked by Zal did not *specifically* violate the trial court's evidentiary orders. *See infra* at ___. Zal did not raise this argument in his briefs or at oral argument because it nevertheless

is clear that he intentionally violated the trial court's orders excluding certain defenses. The *only* question before us is who controls the trial. Under our current system, the trial judge is charged with preserving the decorum that permits a reasoned resolutions of issues. Zealous counsel cannot flout that authority behind the shield of the First Amendment. We hold nothing more.

3. *Zal's other claims*

Zal argues that the contempt citations are void because the trial court's evidentiary orders violated: (1) his clients' Sixth Amendment rights to a trial by jury and effective assistance of counsel; (2) his clients' Fourteenth Amendment right to due process of law; and (3) the Fifth and Fourteenth Amendment rights of the unborn. We address the argument without deciding whether a fetus has Fifth and Fourteenth Amendment rights. Although there is a "general prohibition on a litigant raising another person's legal rights," *Allen v. Wright*, 468 U.S. 737, 751 (1984), Zal is entitled to raise these claims under *Berry*. *See* 436 P.2d at 280 ("violation of an [unconstitutional] order ... cannot produce a valid judgment of contempt"). Zal has alleged "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Zal also can be expected to present the issues "with the necessary adversary zeal." *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.* 467 U.S. 947, 956 (1984).

[4] The trial court's evidentiary orders sought to ensure that the excluded defenses—(1) necessity, (2) defense of others, (3) compliance with international law, treaties, or declarations, and (4) mistake of fact—would not be presented to the jury through a back door. It follows that the evidentiary orders did not violate Zal's clients' Sixth and Fourteenth Amendment rights unless the court erred, as a matter of *federal law*, in excluding those defenses. Zal essentially is arguing that the orders prevented the jury from fully appreciating why his cli-

ents acted unlawfully; there can be no constitutional violation if Zal had no right to present the excluded defenses. Zal had no constitutional right to present evidence merely "to bring out the reason for his clients' actions." *Infra* at ___.

Zal's argument fails. In *United States v. Schoon*, 955 F.2d 1238, 1240 (9th Cir. 1991), we explicitly held that "the necessity defense is inapplicable to cases involving indirect civil disobedience." As in *Schoon*, Zal's clients allegedly "violat[ed] a law . . . that is not, itself, the object of protest." *Id.* at 1240 (defining indirect civil disobedience). There is no necessity defense in these circumstances. The Third Circuit similarly concluded in *Northeast Women's Center v. McMonagle*, 868 F.2d 1342, 1350-52 (3rd Cir.), *cert. denied*, 110 S. Ct. 261 (1989), that the justification defense was unavailable to abortion protestors under both federal and state law. That court rightfully stated:

> We emphasize in particular the numerous legal alternatives that Defendants had available to pursue their goal of persuading women not to have abortions. For example, they could continue to march, go door-to-door to proselytize their views, distribute literature, personally or through the mails, and contact residents by telephone, short of harassment.

Id. at 1352. Zal cites no federal case law that creates a constitutional right to present any of the excluded defenses. We understand Zal's argument, but the trial court's evidentiary orders were not constitutionally infirm.

AFFIRMED.

TROTT, Circuit Judge, Concurring

I concur in Judge Farris' opinion. However, I feel compelled to add a few words about what I see as the two central

issues in this case: the Sixth Amendment "right" to jury nullification of the law, and the First Amendment "right" of an attorney (or his client) to speak freely in a courtroom. I conclude that clients have no right to jury nullification, and that lawyers have no independent First Amendment rights in the courtroom.

Zal claims the trial court's order violated his clients' Sixth Amendment rights, both to a jury trial, and to effective assistance of counsel. He argues he had a right to disobey the court order because his clients had a right to explain themselves (through Zal) to the jury. Judge Noonan's concurring and dissenting opinion picks up on this theme as well:

> The first step in making a defense is to explain why the defendant did what he did. . . . As counsel for those accused of a crime, Zal had an obligation to them to present their defense . . . . Zal, accordingly, had the right to bring out the reason for his clients' actions[,] *[e]ven if the reason for the actions did not constitute a good defense under applicable law* . . . .

Judge Noonan's opinion at 7719-20 (emphasis added). I have two main disagreements with this argument.

First, the argument simply fails to come to grips with Zal's admitted central purpose: to brush aside the court's rulings on the precluded defenses and to prevail wrongfully on the jurors to exercise their illegitimate power of nullification. Such a fundamentally lawless act in a court of law is not protected by the Constitution. To deny an attorney this type of "explanation" is certainly not to deny a defense or right to effective representation. Such an outlandish claim misapprehends the nature of a lawsuit. Indeed, left unchecked, such a practice would allow an attorney intentionally to deprive his *opponent* of a fair trial and due process of law. Had Zal succeeded, the trial would have been reduced to a free-for-all, in which the laws enacted by the people through their democrati-

cally elected representatives effectively would have been ignored and repealed.

I believe neither a defendant nor his attorney has a right to present to a jury evidence that is *irrelevant* to a *legal* defense to, or an element of, the crime charged. Verdicts must be based on the law and the evidence, *not* on jury nullification as urged by either litigant. *See Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). If society deems important certain "explanations," those explanations explicitly can become part of the law. But until then, we should not allow litigants to slip through the back door when the front door is locked. Until then, Zal's "explanations" will be relevant only to sentencing, not to a determination of guilt or innocence. I therefore strongly disagree with Judge Noonan's contrary conclusion. *See* Judge Noonan's opinion at 7720-21.

Second, I agree with the ultimate conclusion of Judge Noonan's opinion that Zal's clients did in fact have the opportunity to explain themselves, as the following excerpt from oral argument reveals:

> Judge Noonan: Did you put a witness on who testified that he was acting out of necessity?
>
> Zal: Well . . .
>
> Judge Noonan: Well, can't you answer that yes or no?
>
> Zal: I can answer it yes or no, and *I need to clarify something that was unfortunately not stated in the facts — and this may make a difference in the Justices' [sic] consideration of this case.* When we finally — this case is on appeal on the normal chan-

> nel, and when we finally went back over with the — I'll get to your question Your Honor — *the prosecution and I and we went over the record* . . . .
>
> Judge Farris: You may get to it after we stop listening and that could be somewhat detrimental to your case.
>
> Zal: Okay. Well, yes, the, with the court's approval, each defendant was allowed to say one time the reason that he blocked those doors. One time, one time only. Defense counsel was not allowed to pursue that line of questioning. In closing arguments I was not allowed to allude to the fact that each client testified that he was there to save the lives of unborn children. *So to answer your question, with the court's approval, the court said that each defendant one time may say, may testify as to the reason he was there blocking the doors and each defendant that testified did that.*
>
> Judge Noonan: So you weren't sanctioned for that?
>
> Zal: No, I was not sanctioned for that.

(Emphasis added.)

The fact that Zal is not satisfied with what he received only emphasizes how easily his approach can undermine due process. If we take seriously Zal's argument — if we allow lawyers to appeal for jury nullification at will and indefinitely, and if we grant defendants a Sixth Amendment right to explain themselves in legally irrelevant terms — then we move to a "system" in which the loudest voice carries the day, in which the phrase "order in the court" literally has no meaning, and in which the law has about as much force as the Cheshire Cat's grin.

Zal also argues the trial court's order violates the First Amendment because it infringes on his own right to free speech. He states, "attorneys retain their First Amendment rights even as participants in the judicial process." In support of this proposition, he cites cases articulating the First Amendment rights of lawyers to speak outside the courtroom, and implicitly seeks to extend the reasoning of those cases to inside the courtroom. Judge Noonan's opinion echoes this approach: "we have already held that 'attorneys and other trial participants do not lose their constitutional rights at the courthouse door.' " Judge Noonan's opinion at 7722 (quoting *Levine v. United States Dist. Court for the Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985), a case involving restrictions on out-of-court communications with the media).

I believe a lawyer properly functioning as such on behalf of a client has no independent First Amendment rights in the courtroom. *Sacher v. United States*, 343 U.S. 1 (1952), and *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991), the two leading Supreme Court cases in this area, essentially hold that in court, an attorney's objection to an adverse ruling *is* his First Amendment remedy. As the Court stated in *Gentile*, 111 S. Ct. at 2743: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."

I believe *Sacher* and *Gentile* are potentially misleading: although they discuss the in-court First Amendment rights of lawyers, in fact those rights do not have any independent substance. In the courtroom, during a judicial proceeding, an attorney's "First Amendment" rights depend exclusively on his client's trial rights. The attorney may speak only to the extent that his client's rights allow him to speak. That is why *Gentile* uses quotation marks when it discusses a lawyer's right to " 'free speech' " in the courtroom. *Id.*

Indeed, even Zal presumably believes the First Amendment does not protect a lawyer who "speaks" in a way that presents to the jury irrelevant or prejudicial evidence. A lawyer may not filibuster a trial. The only time Zal would claim a First Amendment remedy is when the "speech" excluded was *improperly* excluded. And the operative word, "improper," obtains its meaning by reference to the *client's trial rights.*

Traditional First Amendment analysis also supports the idea that lawyers (and others) have no First Amendment right to speak freely in a courtroom: a courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (traditional public fora are "those places which 'by long tradition or by government fiat have been devoted to assembly and debate' " (citation omitted)). Although courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law. The First Amendment does not allow an attorney to speak beyond those confines.

The rhetorical force of this point is illustrated by a consideration of the First Amendment rights of other trial participants. Does a juror have a First Amendment right to speak or to examine witnesses? Does a court reporter have a right to editorialize during closing arguments? May spectators chafe, chant, and cheer? Could an anti-abortion advocate appear and deliver a right-to-life speech to the jury about to deliberate on the charges against Zal's clients? I would think not. And I would think a lawyer representing a client is distinguishable from these other participants *only because of the client.* In a courtroom, a lawyer without a client is like an actor without a part: he has no role to play, and no lines to deliver.

Nor am I convinced by Judge Noonan's argument that the trial court's order violated Zal's *clients'* First Amendment rights. *See* Judge Noonan's opinion at 7722 (Zal "was not

exercising his own First Amendment right. His speech was used for his clients. It is fair to measure his right by theirs."). If a plaintiff or defendant has no trial right to present evidence or testimony, then the evidence or testimony may not be presented. In a courtroom, during a judicial proceeding, the First Amendment simply does not protect speech which exceeds the speaker's trial rights. Until today, I would have thought this proposition too obvious for comment.

In re Little, 404 U.S. 553 (1972) (per curiam), cited on page 7722-23 of Judge Noonan's opinion, is not to the contrary. *Little* reversed the summary contempt conviction of a pro se petitioner who stated in closing argument that the trial court was biased against him, and that he was a political prisoner. *Id.* at 554-56. (Little also called the judge a " 'M----- F-----,' " but that outburst was not involved in the case. *Id.* at 554.) The Supreme Court focused on the lack in Little's case of a threat to the administration of justice. *Id.* at 555-56. Although it cited language from a First Amendment case, *Craig v. Harney*, 331 U.S. 367, 376 (1947), *cited in Little*, 404 U.S. at 555, the Court's holding was based on a different constitutional provision, the Due Process Clause. "The reversal of this conviction is necessarily required under our holding in *Holt v. Virginia* . . . ." *Little*, 404 U.S. at 556.

Holt v. Virginia, 381 U.S. 131 (1965) (Black, J.) (8-1), reversed contempt convictions imposed for the filing of motions for a change of venue due to perceived bias in the trial judge. *Id.* at 132-33. The *Holt* Court reversed the convictions because the petitioners had a *due process* right to file the motions: "since 'A fair trial in a fair tribunal is a basic requirement of due process,' it necessarily follows that motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential." *Id.* at 136 (citation omitted). The contempt was improper because the motions filed were part of "the right to present a defense" in the underlying case. *Id.* at 137.

Both *Holt* and *Little* are based on the parties' trial rights, not on their First Amendment rights, and not on the First Amendment rights of their lawyers. The language in *Little* concerning threats to the administration of justice only reinforces that point: the lawyer may speak only to the extent necessary to protect his client from an improper administration of justice, and he may *not* speak to the extent that he threatens the corresponding rights of the opposing party.

In sum, I concur in Judge Farris' opinion because I do not believe parties to a lawsuit or their attorneys have independent free-speech rights in a courtroom. Zal's clients did not have a federal Constitutional right to have the prohibited words used in an attempt to encourage jury nullification. Given that conclusion, it is clear that neither Zal nor his clients had a First Amendment right to use the words. Hence Zal's custody does not offend the Constitution, laws, or treaties of the United States, and he has no remedy on federal habeas corpus.

NOONAN, Circuit Judge, concurring in the result in part and dissenting in part:

This difficult case presents serious questions as to the professional duties of a lawyer in court, the First Amendment, the Sixth Amendment, and the breadth of a contempt order. I concur in part in the judgment, and write separately because of some difference in my perspective and analysis from that of my two brothers.

The Order Violated

To begin with, so far as I can see, Cyrus Zal was in violation only of the *in limine* word-ban of the municipal court. He did not present a necessity defense and after the municipal court ruled on January 19, 1991 that a mistake of fact defense

was the equivalent of a necessity defense, he did not persist in presenting this defense. Eight times he used phrases that alluded to the abortion issue but were not on the list of forbidden words. I question whether these indirect allusions to abortion fell within an order which, for criminal purposes, should be strictly construed. This language had not been made punishable. The municipal court chose to rule in terms of words. It could not extend its prohibition by analogy.

Zal did violate the word-ban thirteen times by using forbidden words. I focus on these thirteen instances where forbidden language was employed.

Zal's Duty As Counsel

For any human being accused of an offense an explanation of why he or she acted is important. An act without purpose is a subhuman act. The first step in making a defense is to explain why the defendant did what he did. Our law takes a firm stand that a jury should not nullify the law out of sympathy for the motives of the defendants. *See United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). In a variety of cases, however, defense counsel will want to put matters to the jury that, strictly speaking, are irrelevant to the crime charged, but are essential to explaining the act done. In a variety of case defense counsel have, therefore, put before the jury reasons and motives which could not, nor have been, a lawful defense. If a defendant is charged with first degree murder because he deliberately put to death another human being, it is not a defense in law that he did so to put a spouse or a child out of terrible suffering. Counsel, however, would not be performing as counsel if he or she did not proffer to the court the merciful motive that prompted the homicidal act.

Thus, for example, in two Florida cases counsel for the defense was permitted to examine the defendant and to bring out the defendant's merciful motive even though mercy killing is not legal in Florida. *Griffith v. Florida*, 548 So.2d 244

(1989) (defendant killed his three-year old daughter after her head became caught in the footrest of a living room chair); *Gilbert v. Florida*, 487 So.2d 1185 (Fla. App. 4th Dist. 1986) (defendant killed his wife who was suffering from osteoporosis and Alzheimer's disease). Analogously, in California defense counsel brought out that the defendant had assisted an AIDS victim with suicide by strangulation because the defendant "was especially sensitive to the suffering associated with AIDS." *People v. Cleaves*, 229 Cal.App.3d 367 (4th Dist. 1991).

As counsel for those accused of a crime, Zal had an obligation to them to present their defense and to present it not half-heartedly, not mechanically, but zealously. The duty of advocacy, the commands of our profession required no less. Zal, accordingly, had the right to bring out the reason for his clients' actions. Even if the reason for the actions did not constitute a good defense under the applicable law, an explanation allowed the jury to see his clients not as monsters mindlessly invading the rights of other, but as human beings.

The forbidden words used by Zal attempted to explain his clients' motivation and at the same time attempted to evoke the emotions that might be aroused if the jury were to perceive abortion as the killing of unborn children. But the clients of Zal were, as he concedes, not denied the opportunity to explain. Zal wanted to enlarge on their explanation. When Zal zealously enlarged upon this theme, he ran into the court's order.

At that juncture Zal's obligation to his clients had to yield to his obligation to the court. Fundamental as service to a client is, that service can never subvert a lawyer's obligation to the court. Without a court, the lawyer is nothing. With the court, the lawyer is a cooperating part of the system our society has adopted as the best way of assuring justice to everyone.

If the municipal court had refused to allow Zal's clients to explain themselves at all, we would confront a different case. In fact, the municipal court did allow each defendant one explanation of the action taken. Since the court struck that balance, it was not for Zal to seek a different balance of his own. Fidelity to law meant that he must obey. But that duty in California was, as will be shown below, *conditional*. The duty to obey existed only if the order was constitutional. I turn to a consideration of the order's constitutionality.

The Constitutional Rights At Issue.

The Clients' Right To Trial By Jury. As counsel for the defendants, Zal had the right to assert his clients' right to a trial by jury. Was this right violated by the *in limine* bar on certain words?

The use of the *in limine* order in criminal trials was infrequent until the 1960's. *See* Colbert, "The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial", 39 *Stan.L.Rev.* 1271 at 1280 (1987). As the *in limine* motion became more popular with prosecutors, courts have found on occasion that exclusion of an entire defense was an invasion of the jury's province, *e.g.*, *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984). But the *in limine* motion was accepted in trials where the defense of necessity was found irrelevant. In such cases, the defendants sought in vain to introduce a political issue into their trial. The courts did not allow them to turn the trial into a political demonstration. *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985) (necessity defense for anti-missile demonstration excluded); *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983)(necessity defense for antinuclear demonstration excluded).

A critic of these cases has argued that granting the prosecutor's *in limine* motion in politically sensitive cases "suppresses evidence concerning governmental policy that is

essential to the cultivation of an informed citizen." Colbert, "The Motion In Limine" at 1326. The criticism is not without force, but of course other forums exist in which such information can be presented. The precedents now stand in such a way that a court of this circuit cannot conclude that a right to trial by jury is denied by the grant of such a motion.

Zal's Own Right To Free Speech. Could Zal exercise during trial a First Amendment right that was independent of his clients' First Amendment right to free speech? Judge Trott answers this question with a sweeping dictum, No. But we have already held that "attorneys and other trial participants do not lose their constitutional rights at the courthouse door." *Levine v. U.S. District Ct. for the C. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985). It would be ironic if the Constitution failed to protect its professional defenders—the lawyers—in the very forum dedicated to the Constitution's doctrine. But when Zal used the forbidden words to ask the question of witnesses, he was unquestionably functioning on his clients' behalf. He was not exercising his own First Amendment right. His speech was used for his clients. It is fair to measure his rights by theirs.

Zal's Clients' Right to Free Speech. The principal Supreme Court precedent dealing with speech by an advocate during a criminal trial is *Sacher v. United States*, 343 U.S. 1 (1952), a case where the conduct of counsel was obstructive to the point of being an attempt to bring the trial to a halt. The lawyers said and did whatever "could contribute to make impossible an orderly and speedy discharge of the case." *Id.* at 3-4.

In contrast to this censurable speech and conduct, a pro se defendant referred to himself as a political prisoner and the presiding judge as a M--- F----. The Supreme Court reversed this litigant's conviction of contempt, saying, " 'The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the

administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " *In re Little*, 404 U.S. 553 (1972), quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947). The test of imminent imperilling of the administration of justice was applied in *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974), which reversed the petitioner's contempt citation for calling his alleged assailant "a chicken shit" during cross-examination.

These holdings provide broad latitude for the use of language during a trial. They protect abusive and even obscene language in no way connected to the substance of a litigant's case. *A fortiori*, they indicate that the First Amendment protects vigorous speech closely connected with the case being litigated.

The majority, however, set as the standard for Zal's First Amendment rights in court the recent teaching of *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991). In doing so, the majority necessarily relies on dicta, for *Gentile* concerned out-of-court statements by an attorney, not advocacy in a trial. Nonetheless, dicta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding. The Court's dicta the majority quotes are these:

> "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Id.* at 2743.

The Court then cited *Sacher* as precedent.

The dicta do not address a judicial system where it is perfectly lawful for an attorney to ignore an order of the court if

the attorney believes it unconstitutional *and* can successfully show that it is. *Sacher* itself dealt with appropriate conduct for lawyers in a federal court. In that forum, "if the ruling is adverse, it is not counsel's right to resist it." *Sacher*, 343 U.S. at 9. California has a different judicial system. Under California law, a contempt citation is void *if* it is based on an unconstitutional court order. *In Re Berry*, 65 Cal. Rptr. 273, 280 (1968) (An unconstitutional order "is issued in excess of jurisdiction and cannot sustain a contempt judgment based upon its violation"); *In Re Misener*, 38 Cal. 3d 543, 558 (1985) ("An order of contempt cannot stand if the underlying order is invalid."); *In re Blaze*, 76 Cal. Rptr. 551 (1969). Under California procedure, if the attorney is willing to take the risk, he can ignore the void order and be vindicated. *See Glen v. Hongisto*, 438 F. Supp. 10 (N.D. Cal. 1977). In such a system, the dicta of *Gentile* are not a complete guide to the attorney's right to free speech.

Every governmental regulation of speech must be "*justified* without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis original). The justification for prohibiting outbursts in court by jurors, witnesses, or spectators is obvious: an outburst would disrupt the trial. The regulation of lawyers' speech presents a problem that requires much finer analysis when the intent of the lawyer speaking is to serve the client who is on trial. The decorum of the court and the expeditious conduct of the trial justify such restrictions on speech as prohibition of the lawyer insulting the court or delaying the trial or speaking without moderation or speaking irrelevantly. *See Sacher* 343 U.S. at 9. In the instant case, the municipal court viewed the business where the trespass occurred as irrelevant and reference to it as inflammatory. That business was not irrelevant to the defendants, but their explanation of their motives was permitted. Repeated reference to the business of the abortion clinic went beyond explanation in an effort to enlist the jury's sympathy in the defendants' cause. A different trial court might have judged

differently. It was within the discretion of the court to prevent what it thought to be unnecessary recurrence to this theme.

Concluding that the municipal court did not violate the First Amendment rights of Zal's clients, I conclude only that it was within the power of the municipal court to limit the trial to trespass with an explanation of the motive for the trespass. The court did not have to permit repeated introduction of abortion into the trial. Repeated, the issue was irrelevant. The court's order was, therefore, constitutional.

Under California law Cyrus Zal did not act unprofessionally in resisting the order: he had serious reasons for challenging it as overboard, and the court's holding of him of contempt because of the use of non-banned words went beyond its order. It was professionally responsible for him to use the channel provided by California Law to disobey and contest the constitutionality of what the municipal court had commanded. But, on balance, his challenge cannot be fully sustained and his petition for habeas corpus cannot be fully granted. I concur in the result as to the thirteen convictions where Zal violated the trial court's word-ban. I dissent as to the other convictions.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
EL CAJON JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA *Plaintiff,* --v.-- CARLA JEAN BULTSMA, et al., *Defendants*	CASE NO. C101464B, C, E-M ORDER ADJUDGING CONTEMPT COMMITTED IN THE IMMEDIATE VIEW AND PRESENCE OF JUDGE AND JURY ON TWENTY (20) OCCASIONS ATTORNEY CYRUS ZAL, CONTEMNOR HONORABLE LARRIE R. BRAINARD JUDGE

During the trial of the above-entitled action, in this court in El Cajon on the dates and times indicated herein, before the Honorable Larrie R. Brainard, Judge of the El Cajon Municipal Court, and in the immediate view and presence of said judge and the jury, attorney Cyrus Zal did ask the questions and make the statements indicated herein, on twenty (20) occasions.

By way of background, it should be noted that attorney Cyrus Zal represented seven (7) defendants (out of a total of eleven [11] defendants) accused of trespassing at a medical facility where abortions are performed, blocking the entrance, along with numerous other protesters, and promoting their "pro-life" cause. During in limine motions the Court ruled that the trial would be

restricted to the charge of trespass (Penal Code §602[j]) and that abortion, any "necessity defense", and "the rights of the unborn" would not be issues presented to the jury. Counsel and the defendants were specifically instructed not to attempt to improperly influence or proselytize the jury on the above issues.

In spite of the Court's instructions, and in direct contravention of Court orders, attorney Cyrus Zal acted as outlined herein. A copy of a reporter's transcript as to each Hearing Re:

Citation for Contempt is attached hereto and those facts are incorporated herein by reference (Exhibits A through H).

1. Date: January 19, 1990, 9:30 a.m.
   Witness: Lois Solomon, Medical Receptionist
   ZAL: "Is that the place where they empty the contents of a woman's uterus?"
2. Date: January 19, 1990, 9:46 a.m.
   Witness: Ed Rice, Administrator
   ZAL: "Are you familiar with those facilities where two persons go in and only one person comes out alive?"
3. Date: January 19, 1990, 10:00 a.m.
   Witness: Gerald Wagner, Pharmacist
   ZAL, to the Court: "Can't we ask anything about this baby-killing business, Your Honor?"
4. Date: January 19, 1990, 10:15 a.m.
   Witness: Celia Sigmon, Assistant Manager
   ZAL: "What time do the first victims arrive?"
5. Date: January 19, 1990, 10:15 a.m.
   Witness: Celia Sigmon, Assistant Manager
   ZAL: How do you feel about making a living off the blood of babies?"
6. Date: January 19, 1990, 10:16 a.m.
   Witness: Celia Sigmon, Assistant Manager
   ZAL: "Are your paychecks bloodstained?"
7. Date: January 19, 1990, 2:15 p.m.
   Witness: Officer Garcia, La Mesa Police
   ZAL: "Is the unborn baby a life you have sworn to protect?"
8. Date: January 19, 1990, 2:16 p.m.
   Witness: Officer Garcia, La Mesa Police
   ZAL: "Did you feel an obligation to protect the children who would be killed that day?"
9. Date: January 19, 1990, 2:47 p.m.

	Witness:	Officer Garcia, La Mesa Police
	ZAL:	"Officer, were you an unborn baby at some time in your life?"
10.	Date:	January 22, 1990, 4:02 p.m.
	Witness:	Sgt. Marks, La Mesa Police
	ZAL:	"Wasn't the safety corridor the place where the babies were taken to be killed?"
11.	Date:	January 23, 1990, 10:22 a.m.
	Witness:	Michael Monji, Administrator
	ZAL:	"How long have you been in the baby killing business?"
12.	Date:	January 23, 1990, 10:42 a.m.
	Witness:	Michael Monji, Administrator
	ZAL:	"Does the oath you have taken to tell the truth mean anything to someone who is in the baby killing business?"
13.	Date:	January 23, 1990, 10:54 a.m.
	Witness:	Michael Monji, Administrator
	ZAL:	"What's done with the bodies of the babies killed by your employer?"
	ZAL:	Where do the bodies go?"
14.	Date:	January 23, 1990, 10:57 a.m.
	Witness:	Michael Monji, Administrator
	ZAL:	"Are you concerned that you may some day be charged with murder for your role in the abortion holocaust?"
15.	Date:	January 25, 1990, 10:16, 10:18, 11:06 a.m.
	Witness:	Sgt. Marks, La Mesa Police
	ZAL:	"Did you know what babies they were referring to ?"
	ZAL:	"Do you know the time, date and place where a life was going to be taken?"
	ZAL:	What do you do when your oath to protect

life conflicts with your duties?

ZAL: "Do you think perhaps the dog knew the duty to protect life better than the police officers?"

16. Date: January 25, 1990, 4:20 p.m.
Witness: Sgt. Marks, La Mesa Police
ZAL: "Do you think you will always protect the baby killers?"

17. Date: January 26, 1990, during the morning hours.
Witness: Jeffrey Olkie, Defendant (two prior offenses)
ZAL: "Are those convictions worth the lives of unborn babies?"

18. Date: January 26, 1990, 2:31 p.m.
Witness: Marshall Wilson, Defendant
ZAL: "Now, is it from your own personal knowledge that you know two babies were saved from abortions that day?"

19. Date: January 26, 1990, 2:50 p.m.
Witness: Sgt. Marks, La Mesa Police
NOTE: Witness recalled solely to ask this question regarding woman with poster in photo.
ZAL: "Isn't that a poster of an unborn child sucking its thumb?"

20. Date: January 29, 1990, 11:20 a.m.
During closing argument, strongly argued "Jury Nullification".
ZAL closed with: "No one can require you to rubber stamp a system that protects child killing!"

The Court allowed attorney Cyrus Zal the opportunity to explain his actions after each citation for contempt. Mr. Zal stated that he "welcomed" said citations and had incurred same intentionally in order to further his cause.

The Court finds each act of contempt was done intentionally to improperly influence and proselytize the jury in direct contravention of court orders.

At the conclusion of each hearing for contempt the Court did there and then, as I do now, adjudge attorney Cyrus Zal guilty of contempt and order him committed to County Jail for the period of five (5) days on each count of contempt, for a total of 100 days, and further order that he pay a fine of $500.00 on each count of contempt, for total fines of $10,000.00. Execution of all fines and time in jail are stayed until the conclusion of the within trial, when a hearing will be set for execution of sentence.

Trial Commenced:	January 16, 1990
Jury Verdicts:	January 31, 1990

Dated at El Cajon, California.
DATE: Feb. 1, 1990

/s/ Larrie R. Brainard
Larrie R. Brainard
JUDGE OF THE MUNICIPAL COURT

[Stamp showing order entered on May 20, 1991]

[Stamp showing order filed on May 14, 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CYRUS ZAL
Petitioner,

v.

CECIL STEPPE
Respondent,

and

THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Case No. 91-0473 GT

ORDER

Petitioner has filed a writ of habeas corpus seeking to be relieved from a sentence he is serving for contempt of a Municipal court order, El Cajon Judicial District, issued by the Honorable Larrie R. Brainard in the criminal case of People v. Carla Jean Bultsma, et. al.. Stephen E. Hurst, Esq. of the Rutherford Institute of California appeared on behalf of the petitioner, with petitioner serving as associate counsel **in propria persona**. David Florance, Deputy County Counsel, appeared on behalf of respondent Cecil Steppe. Having reviewed the pleadings, exhibits, and arguments in favor and in opposition, the court denies the motion for bail

pending appeal, and denies the writ of **habeas corpus**.

Motion for Bail Pending Appeal

Petitioner's request for bail is denied on two grounds. First, properly viewed the petitioner is seeking review by this court of the California Supreme Court's ruling as to the availability of bail in this case. Citing to California Penal Code §1272, petitioner argues that under California law he has a right to be released pending appeal of the contempt order. While this court would not seek to deprive petitioner of any substantive rights under state law, the highest court of California has already determined that under state law petitioner is not entitled to release pending appeal. As such, this is not a cognizable claim under 28 U.S.C. §2254. Petitioner is seeking review of a state court interpretation of state law, not raising a Federal constitutional issue.

Second, the authority of a district court to release a state prisoner on recognizance or surety in the course of a **habeas corpus** proceeding derives from the power to issue the writ itself. Marino v. Vasquez 812 F.2d 499, 507 (9th Cir. 1987), and not from the California Penal Code. The release on bail of state prisoners is governed by Fed.R.App.P.23. Hilton V. Braunskill 481 U.S. 770, 772 (1987), and Marino at 507. The applicable section of Rule 23 states:

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge of either court.

While this rule does not give the court the considerations it must weigh to determine what is "fitting to the court", the United States Supreme Court in an analogous inquiry has indicated that

the courts should view a request for bail pending review of a writ of **habeas corpus** similar to a request for the stay of an order in a civil proceeding. Hilton at 776. The factors include: 1) whether the applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and 4) where the public interest lies. Id. at 776.

In this case, the court need go no further than the first factor. Petitioner's writ has been denied by six courts. From the record before this court, it appears that at least three of those petitions raised the same Federal constitutional issues argued in this petition. Given the history of petitioner's constitutional argument (see below), this court concludes that petitioner is not likely to succeed on the merits. Furthermore, the public interest lies in preserving the integrity of the Municipal court's order, particularly when the court finds someone in contempt of the court's proceedings. This court regards such contempt as an offense of the most serious nature, which threatens to undermine the fair and efficient determination of controversies in our courts.

Writ of Habeas Corpus

Petitioner represented seven defendants accused of trespassing at a medical facility where abortions are performed. The defendants blocked the entrance along with numerous other anti-abortion protesters. During **in limine** motions the court ruled that the trial would be restricted to the charge of trespass under California Penal Code §602(j) and that certain issues would not be presented to the jury. These include abortion, any "necessity defense", and the "rights of the unborn". Petitioner also alleges that the court ordered a list of words excluded from use in the trial.*

*The exhibit presented by petitioner is not sufficient for the court to draw a conclusion that this motion was actually ruled on by the court. The list of words are not referred to in the record of the contempt hearings, nor in the court's order of contempt. This court's disposition of the writ would not change whether or not the list of words was excluded in limine before trial.

Petitioner on numerous occasions advanced these defenses, and asked questions of witnesses which in the trial judge's opinion were intended to inflame these issues and proselytize the jury. Petitioner was reminded of the court's order, but told the judge and the public that he welcomed the contempt citations.

Eventually, petitioner was sentenced to the contempt, and chose to serve extra days of his sentence **in lieu** of paying a fine for contempt. Petitioner has been under house arrest.

If the court's order is void, then petitioner should be released as "an order of contempt cannot stand if the underlying order is invalid." In Re Misener, 38 Cal. 3d 543, 558 (1985).

Standing

Petitioner alleges that the court's order of contempt is void because it violates his constitutional rights, the constitutional rights of his clients, and the constitutional rights of an unborn child.

There is no dispute that he has standing to vindicate his own constitutional rights. Petitioner claims that the court's order violates his first amendment rights to freedom of speech.

Petitioner also has a right to assert certain rights on behalf of his clients. This is an exception to the general rule that a party raising a claim "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief". Allen v. Wright 468 U.S. 737, 751. (1984).

If an attorney has refused to comply with a court's order because to do so would violate his client's fifth amendment privilege against self-incrimination, and he is held in contempt, he may bring a **habeas** petition seeking relief from that order on the grounds that the order is unconstitutional. Cantillon v. Superior Court 305 F. Supp. 304, 307 (1969). An attorney may also bring an action on behalf of his client charging that defendant's action interfered with his client's constitutional right to counsel. Wounded Knee Legal Defendant/Offense Com. v. F.B.I. 507 F.2d 1281, 1284 (8th Cir. 1974).

Therefore, the court will consider petitioner's writ, but only as to these arguments: that the trial judge's order is unconstitutional and hence void in that it violates petitioner's first amendment rights, and because it violates his clients' 6th amendment rights to counsel.

The court will not consider, however, any of the other arguments raised by petitioner as to why the order is void. Petitioner presents no authority which convinces the court that it has jurisdiction to hear the due process claims or right to a jury trial claims of petitioner's clients. The plaintiffs in the underlying case will have to raise their due process rights on their own through appeal of their convictions. Petitioner also presents no authority giving the court jurisdiction to hear any argument as to the rights of an unborn child. Petitioner has no standing to bring these claims. Any rights an unborn child may have under the fifth or fourteenth amendments that may have been violated by the court's order are not rights that may be vindicated in this forum by this petitioner. See Allen at 751.

As to petitioner's first amendment rights, a lawyer's first amendment rights in court proceedings are not absolute. Certain restrictions on speech may be necessary to insure the fairness of judicial proceedings. For example, lawyers can be sanctioned by the court for trying a case to the press before it has been tried in the courtroom. Hirschkop v. Snead, 594 F.2d 356, 366 (1979).

While petitioner may disagree with the role of a trial judge, the judge must have control over the course of a trial to insure its fairness and to protect the due process rights of all parties. "The judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." Geddes v. United States, 425 U.S. 80, 86 (1975). In this instance, the trial judge ruled **in limine** as to the allowable defenses to the law of trespass. This is not an unusual occurrence, as in any case the judge may rule on the available defenses, clearly a question of law, before the trial begins. This aids in the orderly and fair functioning of the trial.

As to the rulings in this case, the judge was not only within his authority but correct. The ninth circuit has not ruled as to whether the justification defense is allowed when charged with trespass or obstructing entrance to a clinic which performs abortions. But this court agrees with the sound reasoning in NOW v. Operation Rescue, 747 F. Supp. 760, 770 (D.D.C. 1990) and Northeast Women's Center Inc., v. McMonagle 868 F.2d 1342, 1351-52 (3rd Cir. 1989). Any testimony as to the issues excluded **in liminie** are irrelevant to the charges in the eyes of the law.

Petitioner's clients' sixth amendment rights to effective assistance of counsel were not violated by the trial judge's contempt order. Petitioner relies upon a right to "untrammeled and unimpaired" assistance of counsel, citing Glasser v. United States 315 U.S. 60 at 70 (1942). But this argument becomes ridiculous when one considers the circumstances of this case. Petitioner presents no authority for the proposition that his clients have a right to have counsel raise arguments which by law are irrelevant to the charges before the court.

Petitioner's motion for bail pending appeal is denied Petitioner's writ of **habeas corpus** is denied.

IT IS SO ORDERED.

Dated: May 14, 1991

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR
United States District Judge